

Did claimant's low back injury occur as the result of his accidental injury suffered through a series of injuries beginning on November 18, 2007, and continuing through April 8, 2008?

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed.

This matter came before the ALJ on December 31, 2008, at which time both claimant and respondent and its insurance carrier and their respective attorneys appeared. The Order of the ALJ identifies the parties present and the fact that they presented medical exhibits for the ALJ's review. However, no record of this proceeding was made. Additionally, the ALJ did not identify the medical records considered and they were not placed into evidence. The Order does note the matter was taken under advisement and claimant was referred to Paul S. Stein, M.D., for an IME. The Order went on to note that the IME report of Dr. Stein had been received and was reviewed. The ALJ then denied claimant's request for low back medical treatment, as the medical record failed to establish a causal connection between claimant's low back pain and his work-related accident. There is no indication what other medical information the ALJ considered in determining this matter.

The medical report of Dr. Stein reviews claimant's injury history and the medical treatment provided for the accident. On the date of injury, which Dr. Stein's report lists as occurring on November 18, 2007, claimant tripped over "some overhanging rods near the floor" and fell. In trying to break his fall, he reached with his right hand. When he landed, his right wrist was hyperextended and he had to use his left hand to straighten it out. Claimant described pain in his wrist and his back. He finished working that day. The next day, he was sent to James D. Decker, D.O., for the pain in his right wrist and low back. The wrist was treated, but apparently not the back. An MRI was performed on the wrist, and claimant underwent surgery with Dr. James Gluck, on April 8, 2008. Claimant continued to work, but requested treatment for his back. Dr. Decker gave him an injection in his hip. He was released by Dr. Gluck with no restrictions. Dr. Stein's physical examination of claimant indicates a 6'0", obese male, who weighs 317 pounds.

Dr. Stein's report discusses an Accident Report which was completed on November 19, 2007. The report indicates complaints to claimant's right hand and low back. However, a pain diagram only displays right wrist problems. Handwritten reports from claimant's co-workers indicate that claimant told them of the fall and the wrist pain on the day of accident. There is no comment about the low back in Dr. Stein's discussion of the handwritten reports.

Claimant was treated by Dr. Decker from November 19, 2007, through December 18, 2007. Apparently in the December 18, 2007, report, Dr. Decker first makes note of back pain, which Dr. Decker discounted from the accident, as it had not been mentioned before that examination date. In Dr. Stein's report, there is also discussion of

a compact disc of a recorded statement by claimant on November 20, 2007, which only discusses the wrist. Purportedly, it contains no discussion of claimant's back.

Dr. Stein's report details the medical reports of both Dr. Gluck, detailing claimant's wrist surgery, and George G. Fluter, M.D., from his examination of claimant on September 3, 2008. Dr. Stein's report also identifies a discovery deposition of claimant taken on August 5, 2008, and a large volume of Veterans Administration medical records. None of these items are included in this record for the Board's review. The only information available to the Board are the briefs of the parties, the Order of the ALJ, and Dr. Stein's report.

Dr. Stein did not believe, within a reasonable degree of medical probability, that claimant suffered a lower back injury as a result of the November 18, 2007, accident. In reaching this conclusion, Dr. Stein discussed an accident report, which only discussed claimant's wrist; the recorded conversation of claimant on November 20, 2007, only discussing the right wrist injury; medical records from Dr. Decker, indicating only wrist pain until the visit on December 18, 2007; Veterans Administration records, suggesting a past history of low back pain; Veterans Administration notes dated two days after the fall, reflecting only wrist complaints, none of which are available to the Board for its review. Based purely on the report of Dr. Stein, and the information contained therein, this Board Member can only affirm the decision of the ALJ. With this record, no other result is possible.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.¹

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.²

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.³

¹ K.S.A. 2007 Supp. 44-501 and K.S.A. 2007 Supp. 44-508(g).

² *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

³ K.S.A. 2007 Supp. 44-501(a).

The two phrases “arising out of” and “in the course of,” as used in K.S.A. 44-501, et seq.,

. . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase “in the course of” employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer’s service. The phrase “out of” the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises “out of” employment if it arises out of the nature, conditions, obligations and incidents of the employment.”⁴

K.S.A. 2007 Supp. 44-555c grants the Board the jurisdiction to review questions of fact and law as presented and shown by a transcript of the evidence as presented to and determined by an administrative law judge. The Board is not granted original jurisdiction over workers compensation issues, but is limited to considering issues on appeal from administrative law judge decisions.⁵

K.S.A. 2007 Supp. 555c(a) limits the Board’s review to information “as presented, had and introduced before the administrative law judge”. In following that mandate, this Board Member finds that claimant has failed to show his need for ongoing medical treatment for his low back pain stems from the accident occurring on November 18, 2007, while working for respondent. While claimant has alleged a series of accidents through his last day worked, there is no information in this miniscule record to support that allegation.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁶ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

⁴ *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); citing *Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

⁵ K.S.A. 2007 Supp. 44-555c(a).

⁶ K.S.A. 44-534a.

CONCLUSIONS

The Order of the ALJ denying claimant medial treatment for his alleged low back injury is affirmed. Claimant has failed to prove that his back complaints stem from the accident of November 18, 2007, while working for respondent.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order of Administrative Law Judge Bruce E. Moore dated December 31, 2008, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of March, 2009.

HONORABLE GARY M. KORTE

c: James B. Zongker, Attorney for Claimant
Matthew J. Schaefer, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge